Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 76-1707

JUAN M. HUERTA, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

JUAN M. HUERTA, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Juan Huerta, respectfully prays that a Writ of Certiorari issue to review the opinion, judgment and order of the Court of Claims in this case.

OPINIONS BELOW

The 2-1 opinion of the Court of Claims is reported at 548 F.2d 343. It appears in App. A. Judge Davis' dissent appears at App. A-10. The order of the Court of Claims denying Petitioner's motion for rehearing is set forth at App. A-13. That order is not officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on 26 January 1977. Petitioner's motion for rehearing was denied on 4 March 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether a taking, by legislative act and Presidential proclamation, of Petitioner's salvaged materials at the Guantanamo Naval Base, was a "taking" under the Fifth Amendment?

2. Whether there was also a "taking" under the Fifth Amendment when undisputed evidence shows (a) that the bulk of Petitioner's salvaged materials were physically taken by Respondent's employees at Guantanamo and there incorporated into U. S. Government buildings, and (b) that all of Petitioner's materials wound up in the hands of Respondent?

3. Whether there was also a "taking" under the Fifth Amendment when (a) diplomatic relations between the United States and Cuba were broken on 1 January 1961, (b) military hostilities resulted in the Bay of Pigs, (c) undisputed evidence, erroneously disregarded by the Court below, shows that it became the official Navy position at Guantanamo to refuse to permit Petitioner's materials to be removed into Cuba because that would help the Castro government; and (d) all Petitioner's materials wound up in the hands of Respondent at Guantanamo?

4. Whether Petitioner was deprived of procedural due process when the Court failed to decide in accordance with the evidence by erroneously disregarding the following undisputed evidence strongly supporting Petitioner's case:

a. The undisputed testimony of a Government witness, Sergeant Alvarez, that it was the official position of the Navy officials at Guantanamo to refuse to grant Petitioner permission to remove his salvaged

materials from Guantanamo into Cuba because that would help the Castro Government.

b. Undisputed evidence that Petitioner made repeated prior consistent statements that he had requested permission to remove the materials from Guantanamo into Cuba.

c. Undisputed admissions by Navy officials that there had been requests to remove the materials, made by the Navy's failure, in a business relationship, to deny Petitioner's writings stating that there had been requests.

THE CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

The "taking" and due process clauses of the Fifth Amendment to the Constitution of the United States are set forth in Appendix B.

In addition, excerpts from the following are set forth in Appendix B:

1. The Export Control Act of 1949, 50 U.S.C. App. § 2021 et seq.;
2. Current Export Bulletin No. 840;
3. The Foreign Assistance Act of 1961, 22 U.S.C.A. 2370 (a)(1);
4. Proclamation No. 3447, issued by President Kennedy on 3 February 1962, 27 Fed. Reg. 1085, pursuant to the Foreign Assistance Act of 1961 and Export Control Act, placing an embargo on trade between the United States and Cuba;
5. The treaties with Cuba (Agreement with Cuba, 23 February 1903, Treaty Series No. 418 and

426) which established the Guantanamo Naval Base.

STATEMENT OF THE CASE

A. Earlier Contracts at Guantanamo: Petitioner, a businessman in Santiago de Cuba, became a Cuban refugee in 1963, and a U. S. citizen in 1974. Beginning in 1958, Petitioner, with the assistance of his brother Guillermo Huerta, entered into several contracts with the Navy for demolition and removal of buildings at the Guantanamo Naval Base at Guantanamo, Cuba ("Guantanamo"). In 1958, Petitioner performed contracts for the demolition of a hospital complex and a recreation building at Guantanamo (64, 65, 244[1]).

After Castro came into power on 1 January 1959, Petitioner performed, among others, a large contract for the demolition of sixty-two Quonset Huts at Guantanamo. Part of the salvaged materials were sold to the Castro Government, for which the Castro Government paid $40,000 in advance of delivery (81-85, 258).

In each case, when he had dismantled the buildings and reconditioned the salvaged materials and was ready to remove them, Petitioner orally requested permission of the Public Works officials to take the materials from Guantanamo into Cuba (66, 246). The officials invariably provided a pass or letter which granted permission to take the materials through the Northeast Gate, the only route for going by land from Guantanamo to Cuba (67, 246, 247). Then Petitioner removed the materials from Guantanamo into Cuba,

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[1] The numbered references are to the transcript of the testimony at the Trial.

where there was a brisk market for the salvaged materials, and sold them (66-83, 88-89, 246-267).

B. September 1960: Five Demolition Contracts on the Villamar Project Begin: Beginning in September 1960, Petitioner entered into five contracts with the Navy for the demolition of 84 buildings in the Villamar area at Guantanamo (PX 1-5)[2]. Under the contracts, Petitioner obtained title to the valuable materials to be salvaged from the buildings immediately upon entering into the demolition contract. Indeed, the materials were the main consideration to Petitioner for performing the demolition and salvage work. He could profit by the transaction only if he took the materials to Cuba and sold them there. No other recourse was available because the Treaties with Cuba prohibited any "commercial, industrial or other enterprise" at Guantanamo (App. B-6), and Guantanamo officials refused to allow Petitioner to sell the materials elsewhere (127-128, 201-206, PX 29, 37).

C. January 1961: Trouble Starts: We Break Diplomatic Relations With Cuba: Military Hostilities Follow: Castro came in to power in Cuba in January 1959. Then, on 1 January 1961—right in the middle of the performance of Petitioner's first two contracts—there was a disturbing development which thereafter drastically influenced the Navy's attitude toward Petitioner. On 1 January 19[illegible] diplomatic relations between the United States an[illegible]ba were broken (144). Thereafter, Guantanamo Base Policy was not to help Castro (368-88, 517-18, 574).

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[2] "PX" refers to a Plaintiff Exhibit.

Then there were military hostilities at the Bay of Pigs in April 1961 (144). This further stiffened the attitude of Navy officials toward Cuba (144, 145, 335, 336).

On 3 February 1962, President Kennedy proclaimed "an embargo upon trade between the United States and Cuba" (Proclamation No. 3447, 27 Fed. Reg. 1085, App. B-2, 3). Current Export Bulletin No. 840, prohibiting most exports from the United States to Cuba, had gone into effect on October 19, 1960 (App. B-6, 7), but the parties had paid no attention to it (Finding 39).

Finally, the Missile Base crisis in October 1962 further worsened relations with Cuba at Guantanamo (145, 324, 552).

D. Navy Officials Refused to Permit the Materials To Be Removed into Cuba: In late 1960, Petitioner and Respondent arranged for Petitioner to use a remote and deserted part of the Guantanamo Base (323, 328) as a storage area where salvaged materials could be reconditioned as a necessary prerequisite to shipping them into Cuba (99, 275-278, 323, 328, PX-12a). But the salvaged materials, worth up to $900,000 (PX 57), were never shipped into Cuba. Here we come to Sergeant Alvarez' undisputed testimony.

Sergeant Alvarez was a Marine Corps officer—an employee of Respondent—at Guantanamo (384). Beginning in May, 1962 he supervised Petitioner and his brother in intelligence activities for the U. S. Government (392). They were U. S. Intelligence agents working in an official capacity for Sergeant Alvarez during this critical period, and rendered valuable services to the United States (383-386).

At the trial Sergeant Alvarez was under the control of Defendant. He was finally produced by Defendant only at Petitioner's urgent request (123). His testimony is undisputed. He testified from personal knowledge as to official acts performed on behalf of the government. But the Trial Judge, affirmed by the Court below, erroneously disregarded his testimony on the astounding ground that it was "hearsay" (App. A-7, Finding 59).

Specifically, Sergeant Alvarez testified that on "numerous occasions" Petitioner had hold him that Petitioner had made repeated requests for permission to remove the salvaged materials into Cuba, and that his requests had never been granted (385-96). Moreover, he testified that Petitioner also asked his help in getting Petitioner's requests granted by Navy officials, and as to the official acts which he performed as a result. He decided to "intercede" with his superiors to try to get the necessary permission, in order not to jeopardize the confidence of Petitioner and his brother which had been developed during their intelligence work for him (386). And he did intercede with his superiors, who consulted with, among others, the Public Works officials (385, 386, 387, 393, 396-399).

Interestingly enough, Sergeant Alvarez was then told by his superiors that they and Navy Public Works officials already knew all about Petitioner's terials (395-399). In addition, they gave Alvarez a "definitive answer" to his question. It was negative. They told Alvarez that the position of the top Base officials was that the "diplomatic situation" was such that permission to Petitioner to remove the materials into Cuba would not be granted (386, 387, 394, 395). It was

Guantanamo Base policy not to help the Castro Government (336, 386-88, 517-18, 574).

Prior to January 1961, when diplomatic relations with Cuba were broken, Petitioner had always been able to get permission to remove his materials. Thereafter he could never get it. Thus, the breaking off of diplomatic relations, and the Bay of Pigs episode in April 1961, changed the attitude of the Navy officials at Guantanamo toward Petitioner. Thereafter they refused to permit the materials to go into Cuba (386, 387, 394, 395).

In more specific language, the position of the Naval officials at Guantanamo was that authority to Petitioner to take the materials into Cuba would not be granted (386-87). "[W]ord came down that nothing could be done for the Huertas" (394, 395). "[I]t was not possible for them to take" the salvaged materials back to Cuba (386). And see 122-125, 302, 304, 318, 373. "[W]e could not get the permission that they [the Huertas] wanted" (395). "[T]he policy of officials at the Base . . . was not to help the Castro regime" (517, 518, 574). All this is undisputed.

Moreover, this undisputed testimony of Sergeant Alvarez constituted powerful admissions against interest of his employer, the Respondent, evidence of the strongest character in support of Petitioner. See page 14, post.

E. The Physical Taking of the Materials by Respondent's Employees, in Military Uniform and Using U. S. Government Trucks:

Meanwhile, employees of the Government, military personnel, Marines and Seabees, in military uniform (129, 131, 326), and civilian employees (128-130, 326),

and using U. S. Government trucks (125, 129, 192, 194, 195, 325, 326, 327), "countless times" (325, 326), in broad daylight and during working hours, were "progressively and systematically" removing materials from Petitioner's lonely storage area and incorporating them into U. S. Government buildings at Guantanamo (125, 128-130, 143, 185, 192-196, 199, 200-210, 219, 220, 230, 313, 323-330, 343-348, 396, 424-427, 552, 629, 697, PX-28). This strong evidence is undisputed. Indeed, the Trial Judge even complained that the evidence of the physical takings was excessive and "repetitive" (697, 698).[3] And see Judge Davis' dissent, App. A-10.

Further, it is undisputed that during the Missile Base Crisis in October 1962, there was a massive taking of Petitioner's materials by 5,000 new Marines who descended on the Base "for the construction of their pill boxes, fortifications. . . ." etc. (324, 552).

Moreover, apart from this direct evidence, the undisputed circumstantial evidence also shows with compelling force that the materials taken by Respondent's employees could not have gone anywhere but into Government property at Guantanamo. For there is no privately owned real estate at Guantanamo. It is a U. S. leasehold, committed exclusively for use as a Naval station. (Agreement with Cuba, 23 February 1903, T.S. Nos. 418 and 426, App. B-4-6). Each and every building at Guantanamo is U. S. Government owned.

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[3] On rebuttal the Trial Judge finally became fed up with the large amount of evidence of the physical taking of Petitioner's materials by Respondent's employees, which had turned out to be undisputed. He said, "How many times do we have to hear this testimony. . . . . It's not only repetitive of other witnesses but it's repetitive of your case in chief." (697, 698).

Indeed, each one even carries a Navy number. See the maps of the Base (PX 12); and Judge Davis' dissent (App. A-10).

The "bits and pieces" of the materials remaining in 1973 were worthless (132, 329, 330). Except for tiny sales made at Guantanamo through April 1962, aggregating $4,136 (PX 55), every item of Petitioner's materials wound up in the hands of Respondent (184-186, 199, 200-208, 329-330; PX 42).

Moreover, the Trial Judge, affirmed by the Court below, found—admitted—that a substantial amount of Petitioner's materials "were removed by civilian residents on the base for their own uses, such as construction projects in family residences." (Finding 83). But they implied that these "family residences" were not Government property (Finding 83). In so indicating, the Court below was in serious error. Again, there is no privately owned real estate at Guantanamo. Each and every building at Guantanamo is owned by the U. S. Government. In addition, Respondent did not even deny in the Court below that all the buildings at Guantanamo are Government property. Thus, it is undisputed on this record that the materials physically taken from Petitioner by civilian employees of Respondent were incorporated into "family residences" which were Government buildings at Guantanamo.

F. The Holding of the Court Below: The Court of Claims took jurisdiction of the case under 28 U.S.C. § 1491. It held that there was no breach of contract because there were no "requests" by Petitioner for permission to remove the materials from Guantanamo into Cuba.

In so holding, the Court erroneously disregarded and failed to consider certain undisputed evidence. It

failed to decide in accordance with the evidence. See page 13, post.

Second, the Court below held that there was no physical "taking" under the Fifth Amendment. In so holding, it disregarded the strong, undisputed evidence that Government employees, Seabees and Marines—in uniform, and using Government trucks, in broad daylight, and during working hours—took Petitioner's materials and incorporated them into Government buildings. See Judge Davis' dissent, which was not controverted by the majority opinion (App. A-10). We submit that this undisputed evidence shows that Petitioner's materials were "taken" by Respondent within the meaning of the Fifth Amendment.

Third, the Court below held that a taking of Petitioner's materials by Act of Congress and Presidential Proclamation was not a "taking" under the Fifth Amendment. It followed the Contracting Officer. In his decision of 9 August 1967, the Contracting Officer had stated that "to the extent that you were also prevented from shipping this material to Cuba by provisions of the Trade Embargo Act of 1962 [sic], this law is a sovereign act, and the Government as a contractor is not responsible for the consequences or effect thereof." (App. to Pl. Req. for Findings dated 10 October 1974.)

In the Court below Respondent, echoing the Contracting Officer, argued (Res. Brief p. 26) that any removal of the materials into Cuba "would have been barred by current Export Bulletin No. 840, issued under the Export Control Act of 1949 . . . Bulletin No. 840 is clearly a public and general act of the United States, the consequences of which cannot enable the

plaintiff to just compensation under the Fifth Amendment." "[T]he United States is not liable under the Fifth Amendment for its acts performed in a sovereign capacity. (Res. Brief p. 29).

The Court below adapted Respondent's argument. Tucked away in a potent footnote, it held that Export Control Bulletin 840 and the 1962 Trade Embargo (App. B-2-6) had the effect of "depriving" Petitioner "of his property" but that this did "not establish liability . . . for a taking." App. A-9, footnote 2.

REASONS FOR GRANTING THE WRIT

I. Conflict With Decisions of This Court: The Court below has decided a federal question in conflict with decisions of this Court. It held that "depriving Petitioner of his property" by certain legislative and Executive acts—the Export Control Act of 1949, Current Export Bulletin 840, and President Kennedy's Trade Embargo Proclamation of 3 February 1962, App. B-1-4, did not "establish liability . . . for a taking" under the Fifth Amendment, App. A-9, footnote 2. In its order denying Petitioner's Motion for Rehearing, the Court below reemphasized this holding by adding the words "in the circumstances of this case" after the word "taking" (App. A-13).

It is settled that a taking under the Fifth Amendment can result from a sovereign act, including legislative and executive acts.

Thus, this Court has held repeatedly that a sovereign act may constitute a taking. It held that the Government "took" property under the Fifth Amendment by means of an Executive Order of general application in *U. S.* v. *Pewee Coal Co.*, 341 U.S. 114, 95 L.Ed.

809 (1951); by a State statute destroying "previously existing rights of property and contract," *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413; 67 L.Ed. 322 (1922); through such sovereign acts as flying military planes over private property, *United States* v. *Causby,* 328 U.S. 256, 90 L.Ed. 1206 (1946); and by the maintaining of the Mississippi River at its high water level, *United States* v. *Kansas City Life Ins.* 339 U.S. 799, 94 L.Ed. 1277 (1950).

In our case, the taking was direct, complete and absolute. The Court below held that Petitioner was "deprived . . . of his property" by the sovereign acts. That was a taking. In addition, Respondent itself took complete and absolute dominion over Petitioner's materials and consumed them all—a second taking.

II. Denial of Procedural Due Process: The Court below deprived Petitioner of procedural due process, in that (a) it refused to consider undisputed evidence, and (b) failed to decide in accordance with the evidence.

A major issue before the Court of Claims revolved around the reason why the materials were not taken to Cuba. Plaintiff's witnesses testified that Plaintiff repeatedly requested permission of Navy officials to remove the materials, but that such permission was never granted (103-07, 281-85, 301, 384, 487, PX 8). This testimony was strongly supported by the following undisputed evidence which the Court below erroneously disregarded and failed to consider:

A. In holding that there were no "requests" by Petitioner for permission to remove the materials from Guantanamo into Cuba, the Court below, affirming the Trial Judge, erroneously disregarded as "hearsay" the potent and undisputed testimony of a Government

employee, Sergeant Alvarez, which strongly supported Petitioner's case that there were requests, *supra* p. 6-8. The Alvarez testimony constituted admissions against interest of Respondent. *Federal Rules of Evidence,* 801(d)(2); 29 *Am.Jur.* 2d, *Evidence,* §597; 31A C.J.S., "*Evidence*" §311 (such testimony is "primary evidence"); *Wigmore on Evidence* §1048; *McCormick on Evidence* pp. 639-641 (2nd ed.).

Above all, any conflict in the testimony should have been resolved with the aid of a consideration of the Alvarez' testimony. In failing to consider Alvarez' testimony, the Court below deprived Petitioner of procedural due process and failed in its duty to decide in accordance with the evidence. *Morgan* v. *United States,* 304 U.S. 1, 82 L.Ed. 172.

B. The Court below also refused to consider the strong evidence of Petitioner's repeated prior consistent statements to Silvio Cardero (31, 126, 304), Doris Navarro (126, 220, 223, 302), Sergeant Alvarez (126, 301-304, 384-396), Perez Valencuello (126), Robert Pendleton (126, 304), and others (126), that he had made repeated requests for permission to remove the materials into Cuba. It is elementary that prior consistent statements are properly admissible in evidence to rebut an implied charge of recent fabrication. Federal Rules of Evidence 801(d)(1)(B); *McCormick on Evidence,* 2d ed., §252, p. 604; *Jones on Evidence,* 6th ed., §10:19. Again, the Court below gave no reason for disregarding this evidence. Again, in refusing to consider this evidence, the Court below denied Petitioner procedural due process by failing to decide in accordance with the evidence.

C. The Court below also erroneously disregarded as "hearsay" (App. A-7, Fdg. 59) the undisputed testi-

mony of Sergeant Alvarez that it was the official position of the Navy officials at Guantanamo to refuse permission to Petitioner to remove the materials into Cuba because that would help the Castro Government, D. *supra*, p. 6-8. In disregarding this undisputed evidence, these admissions against interest of Respondent, the Court below again deprived Petitioner of procedural due process by refusing to decide in accordance with the evidence.

D. The Court below also erroneously refused to consider Respondent's admissions that there were requests for permission to remove the materials into Cuba. These admissions stemmed from Respondent's failure to deny Petitioner's written statements, made in a business relationship, that there were such requests. Please see App. C-1. It is settled that a failure to deny statements made in a business relationship constitutes an admission that the statements are true. *McCormick on Evidence,* 2d ed., pages 653, 654, *"Admissions"; Jones on Evidence,* 6th ed., § 13-49; *Wigmore on Evidence* (Chadbourne Rev. 1922) § 267, 292, 1072; *Helenic Lines Ltd.* v. *Gulf Oil Co.,* 340 F.2d 398 (2d Cir., 1965). Again, the Court below gave no reason for refusing to consider this evidence.

E. Respondent's witnesses, Captain Burky and Lt. Cronenberg, consistently with the anti-Castro position of Navy officials at Guantanamo—testified that Plaintiff never made requests to remove the materials into Cuba, on the theory that if he did the materials would be "confiscated." (294-94, 546-48). But it is undisputed in any event that the "confiscation" of the salvaged materials would have been a physical impossibility, inasmuch as, consistent with prior practice under previous demolition contracts, it is undisputed

that the salvaged materials would have been shipped into Cuba in approximately 250 truckloads over a substantial period of time. No more than 2 truckloads would have been delivered at any one time, and payment for them would have had to be made before there would have been further delivery. (93, 624, 693, 394). Thus, even if the Cuban Government had had some desire to "confiscate" the materials—and the undisputed evidence is to the contrary, that the Cuban government was desperately eager to purchase them (313, 380, 381)—it would have been a sheer physical impossibility for the Cuban Government to have confiscated more than one or two truckloads (624, 694).

In addition, it is undisputed that Petitioner complained strenuously to Navy officials that a competitor, Vargas, who had reconditioned a much smaller amount of salvaged materials in a storage area at Guantanamo, was permitted to remove them into Cuba about February 1961 (107, 191, 283, 284). And Vargas' materials were not confiscated when taken into Cuba (106, 107, 283-285).

III. Departure From the Accepted Course of Judicial Proceedings: Apart from I and II above, the Court below has so far departed from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

A. The Court below sustained the Respondent in a position which is in breach of a duty of candor and good faith. The Government's failure to produce evidence "peculiarly within its possession" explaining what happened to the materials which were taken into its possession by its employees at Guantanamo, "casts an adverse inference," *Paccon, Inc.* v. *United States,*

185 Ct. Cl. 24, 40; *Alpirin* v. *United States,* 124 Ct. Cl. 670, 675, 111 F.Supp. 280, 283 (1953), *Interstate Circuit Inc.* v. *United States,* 306 U.S. 208, 221; 83 L.Ed. 610.

We submit that the Government should have had enough candor to explain what it did with the great quantity of Petitioner's materials physically taken by Government employees into its possession.

B. Except for the tiny sales described through April 1962 (*supra,* p. 10), it is undisputed that the great bulk of Petitioner's materials were physically taken by Respondent's employees, and that every item of Petitioner's materials wound up in the hands of Respondent. On these facts, Respondent should not be able to evade responsibility for them under the Fifth Amendment.

C. We submit that this Court should straighten out the Court of Claims on the unusually serious errors of evidence set forth in II above, p. 13). The appropriate consideration of evidence is specially important in that Court, if justice is to be done.

D. Finally, Petitioner should not be denied recovery when diplomatic relations between Cuba and the United States were broken, the two countries engaged in military hostilities at the Bay of Pigs, and the undisputed evidence, erroneously disregarded by the Court below, shows that it became the official Navy position to refuse to grant permission to Petitioner to remove the materials into Cuba, because that would help Castro (*supra,* p. 6-8).

Property rights are still important to this Petitioner Substantially all his assets are tied up in this litigation.

CONCLUSION

We submit that the Court should:

1. Grant the Petition and summarily reverse the decision below on the grounds stated above; or

2. Grant the Petition and summarily reverse the Court below on the dissent of Judge Davis (App. A-13); or

3. Grant the Petition and set the case for oral argument.

Respectfully submitted,

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